80-5602

No. 80-

RECEIVED
OCT 27 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CURFEW DAVIS,

Petitioner

v.

STATE OF GEORGIA, ET AL.

Respondents

MOTION TO PROCEED IN FORMA PAUPERIS

The petitioner, Curfew Davis, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of Georgia without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. In support of said Motion petitioner submits the attached Affidavit of Indigency from Curfew Davis.

Robert B. Mann

Robert B. Mann
MANN & RONEY
344 Wickenden Street
Providence, R.I. 02903
Attorney for Petitioner

IN THE

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-against-

STATE OF GEORGIA, et al.,

Respondents.

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, Curfew Davis, being first sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my Motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; that I believe that I am entitled to redress on petition for certiorari.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the petition for certiorari are true.

1. Are you presently employed?

A. No.

1b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. Prior to my arrest in 1974; salary dependent on how many hours of work there was per month--never more than $500.00 per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source?

A. No.

3. Do you own any cash or checking or savings accounts?

A. No.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

A. No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

A. None.

I understand that a false statement or answer to any question in this Affidavit will subject me to penalties for perjury.

Curfew Davis
Curfew Davis

SUBSCRIBED AND SWORN TO before me this 17th day of October, 1980 in the County of Butts, State of Georgia.

Dimelton Tomkies
Notary Public

My commission expires:
August 20, 1984

CERTIFICATE OF SERVICE

I hereby certify that I have sent, by prepaid postage, three copies of the Motion to Proceed in Forma Pauperis, to Arthur K. Bolton, Attorney General, 132 State Judicial Bldg., 40 Capital Square, S.W., Atlanta, Georgia 30334; Mr. M. Francis Stubbs, P.O. Box 325, Reidsville, Georgia, 30452; and Jerry Willis, P.O. Box 508, LaGrange, Georgia 30241 on the 24th day of October, 1980.

Robert B. Mann

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CURFEW DAVIS,

Petitioner,

-against-

STATE OF GEORGIA, CHARLES BALKCOM, DAVID D. EVANS, C. FRANK TRAYLOR, HAWLEY SMITH, RICHARD ENGLISH, CHARLES R. WHITAKER, SR., MARVIN JONES, DAN ALEXANDER, FRANK McCALL, HOMER DURRENCE, J.E. STANFIELD and JULIAN THOMAS,

Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF GEORGIA

ROBERT B. MANN
MANN & RONEY
344 Wickenden Street
Providence, Rhode Island 02903
ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

Does the decision of the Georgia Supreme Court that the Tattnall County Superior Court did not have the authority, in the exercise of its discretion, to appoint counsel for petitioner, an indigent death row inmate seeking habeas corpus relief, deny petitioner equal protection of the law and his constitutional right to meaningful access to the courts?

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IN THE

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-against-

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PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF GEORGIA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Georgia entered July 16, 1980, and upon which rehearing was denied July 30, 1980.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia is not yet published. It was rendered on July 16, 1980, and a Motion for Rehearing was denied July 30, 1980. A copy of the opinion and order denying the motion for rehearing is annexed as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on July 16, 1980, and the judgment denying the motion for rehearing was entered on July 30, 1980. Jurisdiction of of this Court is invoked under 28 U.S.C. §1257(3), petitioner

having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, Section One of the United States Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor denyto any person within its jurisdiction the equal protection of the laws.

Georgia Code Annotated 50-127.

> Exclusive procedure for suing out a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence imposed against them by a state court of record.
>
> Notwithstanding the other provisions of this Title, the following is the exclusive procedure for suing out a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence imposed against them by a state court of record:
>
> (1) Grounds for writ.--
>
> Any person imprisoned by virtue of a sentence imposed by a state court of record who asserts that in the proceedings which resulted in his conviction that there was a substantial denial of his rights under the Constitution of the United States or of the State of Georgia or the laws of the State of Georgia may institute a proceeding under this section. Except for objections relating to the composition of a grand or

traverse jury, rights conferred or secured by the Constitution of the United States shall not be deemed to have been waived unless it is shown that there was an intentional relinquishment or abandonment of a known right or privilege which relinquishment or abandonment was participated in by the party and was done voluntarily, knowingly, and intelligently. The right to object to the composition of the grand or traverse jury will be deemed waived under this section, unless the person challenging the sentence shows in the petition and satisfies the court that cause exists for his being allowed to pursue the objection after the conviction and sentence has otherwise been filed.

(2) Petition and verification.--
The petition shall identify the proceeding in which the petitioner was convicted, give the date of rendition of the final judgment complained of, and clearly set forth the respects in which petitioner's rights were violated. The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached. The petition shall identify any previous proceedings that petitioner may have taken to secure relief from conviction. Argument and citations of authorities shall be omitted from the petition. A petition must be verified by the oath of the applicant or some other person in his behalf.

(3) Jurisdiction and venue.--
The petition must be filed in the superior court of the county wherein the petitioner is being detai ed. The superior courts of such counties have exclusive jurisdiction of habeas corpus actions arising under this section.

(4) Service of the petition.--
Service of the petition shall be made upon the person having custody of the petitioner. If the petitioner is being detained under the custody of the Board of Corrections, an additional copy of the petition shall be served on the Attorney General; however, if the petitioner is being detained under the custody of some other authority other than the Board of Corrections, an additional copy of the petition shall be served upon the solicitor general of the county wherein the petition is filed. Service upon the Attorney General or the solicitor general may be had by mailing a copy of the petition along with a proper certificate of service.

(5) Custody of petitioner.--
Custody and control of the petitioner shall be retained by the Board of Corrections or other authority having custody of the petitioner and it shall be the duty of such board or authority to produce the petitioner at such time and places as the court may direct.

(6) Proceedings on petition.--
Within 20 days after filing and docketing of the petition, or within such further time as the court may set, the respondent shall answer or move to dismiss the petition. The court shall set the case for a hearing on the issues within a reasonable time after the filing of defensive pleadings.

(7) Disposition in the trial court.--
(a) The court may receive proof by depositions, oral testimony, sworn affidavits, or other evidence.
(b) The taking of depositions or depositions upon written questions, by either party, shall be governed by the provisions of sections 81A-126 through 81A-132 and 81A-137: Provided, however, that the time allowed in section 81A-131 for service of cross-questions upon all other parties shall be 10 days from the date the notice and written questions are served.
(c) If sworn affidavits are intended by either party to be introduced into evidence, the party intending to introduce the affidavit shall cause it to be served upon the opposing party at least five days in advance of the date set for a hearing in the case. The affidavit so served shall be accompanied by a notice of the party's intention to introduce it into evidence. The superior court judge considering the petition for writ of habeas corpus may resolve disputed issues of fact upon the basis of sworn affidavits standing by themselves.
(d) If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence challenged in the proceeding and such supplementary orders as to rearraignment, retrial, custody or discharge as may be necessary and proper. In all cases, the court shall dispose of the matter as law and justice require.

(8) Transcribing proceedings.--
All trials held under this section shall be transcribed by a court reporter designated by the superior court hearing the case.

(9) Judge's findings of fact and conclusion of law.--
After reviewing the pleadings and evidence offered at the trial of the case, the judge of the superior court hearing the case shall make written findings of fact and conclusions of law upon which the judgment is based. Such findings of fact and conclusions of law shall be recorded as part of the record of the case.

(10) Subsequent petitions -- waiver of grounds not claimed.--
All grounds for relief claimed by a petitioner for a writ of habeas corpus shall be raised by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of the State of Georgia otherwise requires, or any judge to whom the petition is assigned, on considering a subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

(11) Practice as to appeals.--
(a) Appeals in habeas corpus cases shall be governed by the Appellate Procedure Act of 1965 [§6-701 et seq.], except that as to final orders of the court which are adverse to the petitioner, no appeal shall be allowed unless a justice of the Supreme Court of Georgia shall issue a certificate of probable cause for such appeal.
(b) Within 30 days from the entry of the order denying relief to the petitioner, a written application for a certificate of probable cause to appeal must be filed with the clerk of the Supreme Court of Georgia, if the unsuccessful petitioner desires to appeal. The petitioner shall also file, within the same period, a notice of appeal with the clerk of the concerned superior court. A justice of said appellate court shall either grant or deny the application within a reasonable time after filing. So the justice may fully consider the request for a certificate, the clerk of the concerned superior court shall forward, as in any other case, the record and transcript if designated, to the clerk of the Supreme Court of Georgia when a notice of appeal is filed. The clerk of the concerned superior court need not prepare and retain and the court reporter need not file, a copy of the original record and a copy of the original transcript of proceedings. The clerk of the Supreme Court of Georgia shall return the original record and transcript to the clerk of the concerned superior court upon completion if the appeal of the certificate is granted. If the Justice of the Supreme Court of Georgia denies the application for a certificate of probable cause, the clerk of the Supreme Court of Georgia shall return the original record and transcript and notify the clerk of the concerned superior court and the parties to the proceedings below of the determination that probable cause does not exist for appeal.
(c) If the trial court finds in favor of the petitioner, no certificate of probable cause need be obtained by the respondent as a condition precedent to appeal. A notice of appeal filed by the respondent shall act as a supersedeas and stay the judgment of the superior court until there is a final adjudication by the appellate court: Provided, however, that while such case is on appeal, the petitioner may be released on bail as is now provided for in criminal cases, except where the petitioner has been convicted of a crime over which the Supreme Court of Georgia has jurisdiction to consider on direct appeal. The right to bail and the amount of bond shall be within the discretion of the judge of the superior court where the sentence successfully challenged under this Chapter was originally imposed.

STATEMENT OF THE CASE

Petitioner seeks certiorari from the Supreme Court of Georgia reversing the judgment of the Superior Court of Tattnall County appointing counsel for him to determine the merits of his habeas corpus claim and to represent him in the state court if said claim were to be meritorious.

Petitioner was convicted and sentenced to death in the Superior Court of Troup County; his conviction and sentences were affirmed by the Georgia Supreme Court, Davis v. State, 236 Ga. 804 (1976). Subsequently his death sentence was vacated by this Court. Davis v. State, 439 U.S. 122 (1976). The Georgia Supreme Court ordered a new trial on sentencing. Davis v. State, 238 Ga. 295 (1977). Petitioner was resentenced to death and that sentence was affirmed by the Georgia Supreme Court. Davis v. State, 241 Ga. 376 (1978).

Thereafter petitioner filed an amended complaint in the Superior Court of Tattnall County requesting, inter alia, that he be provided with the assistance of counsel to prepare and litigate a petition for a writ of habeas corpus. A hearing on this complaint was conducted before the trial court at which there was uncontradicted testimony of the need for counsel to prepare and litigate the petition for a writ of habeas corpus (Tr. of hearing on amended complaint at 12-13; 17-18; 33). The evidence also indicated that the preparation of the petition for a writ of habeas corpus and litigation of it would require both factual development of matters not presented at the trial and the elucidation of complex legal issues (Tr. of hearing on amended complaint at 36-37). The Superior Court appointed State funded counsel to examine the petition and to represent him if it were determined that such petition were meritorious.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The petitioner filed an amended complaint seeking the appointment of counsel to pursue his writ of habeas corpus in Tattnall County Superior Court. A hearing was held on this complaint at which petitioner adduced evidence as to his need for counsel and his inability to pay for that counsel on his own. The Superior Court ordered the appointment of counsel for the purpose of determining whether or not there was merit to petitioner's claim, with the mandate to pursue the petition for a writ of habeas corpus if a determination were made that the petition was meritorious.

REASON FOR GRANTING THE WRIT

In this case the Georgia Supreme Court reversed a trial court order appointing counsel to determine whether or not an indigent death row inmate's potential habeas corpus claim was meritorious and then to represent him on the claim if it were determined to meet that criterion. This Court should grant certiorari to determine whether or not the Georgia Supreme Court's decision denied petitioner his constitutional right to meaningful access to the courts and his right to equal protection of the laws.

THE PETITIONER WAS DENIED EQUAL PROTECTION OF THE LAW

The Fourteenth Amendment stands as a shield against the unequal imposition of punishment upon the poor. In a long series of cases, this Court has invalidated processes which denied the poor access to the Courts or made that access ineffectual. In Griffin v. Illinois, 351 U.S. 12 (1956), this Court mandated that an indigent be provided the necessary transcripts to pursue an appeal; in Burns v. Ohio, 360 U.S. 252 (1959), the Court struck down a scheme which required an indi-

vidual to pay filing fees as a prerequisite to prosecuting the appeal. In Smith v. Bennett, 365 U.S. 708 (1961), the Court struck down a scheme which denied indigents access to the Courts for the purposes of seeking collateral review unless a filing fee could be paid. In each of these cases, the impediment to access to the judicial system was clearly cost, be it a filing fee or the cost of the transcript. Any impediment was absolute in that without the filing fee or the transcript, the indigent Petitioner was not only put in a different position than the non-indigent Petitioner, but was absolutely foreclosed from obtaining relief.

Simply to gain access to the judicial system does not satisfy the command of the constitution's due process clause as this Court recognized in Douglas v. California, 372 U.S. 353 (1963). Most often, to make that access more than a legal fiction, assistance must be provided the indigent inmate whether it be in the form of an attorney for an appeal, Douglas v. California, supra; the assistance of 'jailhouse' lawyers, Johnson v. Avery, 393 U.S. 483 (1969); the assistance of law students and para-professionals, Procunier v. Martinez, 416 U.S. 396 (1974) or the provision of adequate legal resource materials, Bounds v. Smith, 430 U.S. 817 (1977). The recurrent theme of these cases is that the Constitution commands that indigent inmates have meaningful access to the judicial system and that no talismanic formula prescribes the way in which that access is to be insured. Indeed, Bounds v. Smith explicitly encourages local experimentation. Even as this Court rejected a claim that appointment of counsel was constitutionally mandated for discretionary appeals,it reiterated that the touchstone of the constitutional requirement of access to the courts was that it be meaningful; i.e., that it provide a real way in which an inmate can present claims to the judicial system. Ross v. Moffitt, 417 U.S. 600 (1974).

The approach in Bounds is not novel, but is patterned on the flexible approach this Court has said was possible with respect to the furnishing of transcripts for indigents. In Mayer v. City of Chicago, 404 U.S. 189 (1971), this Court opined that the obligation of the State was not necessarily to make a complete transcript available to every indigent appellant, but to make available a record that was adequate to permit proper consideration of his claims. See also Coppedge v. United States, 369 U.S. 438 (1962). Draper v. Washington, 373 U.S. 487, 495-96 (1963) also explicitly sanctions alternatives to providing complete records of trial.

Though grounded upon a Sixth and Fourteenth Amendment rationale, there has also been a deliberate extension of the rights of an indigent to counsel prior to trial. Through Gideon v. Wainright, 372 U.S. 335 (1963), Argersinger v. Hamlin, 407 U.S. 25 (1972) and Scott v. Illinois, 440 U.S. 367 (1979), this Court extended the right to counsel to all felony defendants and misdemeanor defendants facing a jail sentence. Almost fifty years ago, death sentences imposed upon young teenage men were reversed on the ground that they did not have counsel for capital trials. Powell v. Alabama, 287 U.S. 45 (1932), and before the right to counsel was extended to the whole class of felony defendants, this Court held that defendants in capital cases were constitutionally entitled to the appointment of counsel in state courts. Hamilton v. Alabama, 368 U.S. 52 (1961).

In Mayer, supra, at 197, the Court's opinion cites Shapiro v. Thompson, 394 U.S. 618 (1969) approvingly for the proposition that cost is irrelevant in assessing the constitutionality of criminal procedures which treat the poor and the rich differently. Shapiro adopts the requirement that any classification which affects the exercise of fundamental constitutional

rights can only be sanctioned if it satisfies a compelling state interest. Griffin does not discuss the equal protection question in the terms adopted subsequently by this Court in Shapiro but holds simply:

> Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.

Griffin v. Illinois, supra, 351 U.S. at 19.

Ross v. Moffitt, supra, though explicitly decided on equal protection grounds, also does not define the standard to be employed in determining the constitutionality of state action. The opinion says only that "The question is not one of absolutes, but one of degrees." Ross v. Moffitt, supra, 417 U.S. at 612.

Except for the brief sentence in Ross, there has been virtually no discussion of an indigent's right of access to the courts since the spate of equal protection litigation over the last decade. During that time, an intermediate equal protection test that requires classifications to satisfy an important and articulated purpose substantially related to the classification has developed, Craig v. Boren, 429 U.S. 190 (1976), rehearing denied, 429 U.S. 1124 (1977), and a number of commentators have suggested that in reality the doctrinal underpinnings of equal protection cases no longer rest on even a two or three-tiered standard. See Gunther, The Supreme Court, 1971 Term-Forward: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972); Karst and Horowitz, The Bakke Opinions and Equal Protection Doctrine, 14 Harv. Civ. Rts. - Civ. Lib. L. Rev. 7 (1979). In Regents of the University of California v. Bakke, 438 U.S. 265, 357 n. 30 (1978)(Brennan J. concurring in the judgment in part and dissenting in part), in a footnote Justice Brennan also suggests uncertainty about the current state of equal protection law intimating that a sliding scale analysis is in reality what has now been

adopted. For a decade, Justice Marshall has said in effect that there is a sliding scale under which the nature of the interest whose advancement is sought is one of the criteria which determines the extent of judicial scrutiny. Dandridge v. Williams, 397 U.S. 471, 508, 520-21 (1970)(Marshall J. dissenting).

Petitioner would submit that whatever doubt exists about the vitality of a two or three-tiered basis for equal protection analysis, this case does not compel re-examination of that approach. There can be no more fundamental constitutional right than that of access to the Courts and there is no compelling state interest to justify interruption of that right.

Even if a two or three-tier test, with its invocation of the compelling state interest standard is not applied, but a balancing approach instead is employed, appointment of counsel is required. Assuming that the issue were one of balancing, or weighing, the question this case poses is whether or not the failure to appoint counsel will effectively foreclose access to the Courts, or simply put the indigent litigant in a slightly disadvantageous position when compared with an affluent litigator. Clearly, absolute equality is not mandated by the equal protection clause. San Antonio School District v. Rodriquez, 411 U.S. 1 (1973); Ross v. Moffitt, supra.

The answer to this inquiry lies in the factual setting of this case. After considerable testimony before a trial judge which showed that the allegations in the petitioner's post-conviction challenge involved complex legal questions which necessitated the collection of and presentation of evidence, the trial court made a decision to appoint counsel initially only for the purpose of determining if the petitioner's case was meritorious. The case raises very different questions from those posed in Ross. There is a requirement that evidence be collected

and presented to a trial court. A prisoner is peculiarly unable to fulfill that requirement. Also, the legal questions in this case had not already once been considered by an appellate court and once briefed by counsel. The difference between this case and Ross, put more simply, is that in this case, neither the facts nor the law are now in a posture to be considered by the trial court, while in Ross both were already in such a format as to be suitable for judicial review.

There is also one other difference between this case and Ross which is critical, particularly if equal protection analysis is predicated on some form of balancing or weighing of interests. This is a capital case. Ross involved convictions for forgery and uttering a forged instrument. Whatever scales are used for any weighing of interests, the fact that this case involves the death penalty is of controlling significance in an assessment of equities. As Mr. Justice Stewart has said:

> Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

This is also not a case where there is a possibility that some form of counsel substitute could satisfy the requirement of providing petitioner with access to the judicial system. Unlike Vitek v. Jones, 100 S.Ct. 1254, 1265-67 (1980)(Powell J. concurring in part), this is not a case where there is a reasonable likelihood that some other type of professional, such as a mental health worker, might provide equivalent assistance to petitioner. Moreover, this is not a case where society's interest in maintaining a relatively informal and speedy forum for the resolution of disputes on the edge of the criminal justice system militates against the appointment of counsel and in favor of the maintenance of substitute procedural devices to assist the 'accused'. Baxter v. Palmigiano, 425 U.S. 308 (1976); and Middendorf v. Henry, 425 U.S.

25 (1976). Just as there is no constitutional obligation to provide an appeal to a defendant in a criminal proceeding, Douglas v. California, supra, there is no constitutional obligation to provide a defendant in a criminal proceeding with a means by which to collaterally attack a conviction. Once that process is provided, however, equal protection demands that the indigent defendant be afforded a substantially similar opportunity to utilize this aspect of the criminal justice system. The factual context of this case, based on an evidentiary hearing before a trial court judge, is that counsel is required in this case to afford petitioner the opportunity to use the post-conviction process in a meaningful way and there is nothing in the record upon which to base a rejection of this conclusion. Equal protection demands, at the very minimum, that the indigent litigant be given an opportunity to utilize the same judicial processes available to other defendants in challenging a criminal conviction.

THE DECISION OF THE GEORGIA SUPREME COURT DENIED PETITIONER HIS RIGHT OF ACCESS TO THE COURTS.

Prisoners possess a fundamental constitutional right of access to the Courts, Bounds v. Smith, 430 U.S. 817, 821 (1977). That access must be "adequate, effective and meaningful", Bounds v. Smith at 821. See, e.g., Burns v. Ohio, 360 U.S. 252, 257 (1959); Smith v. Bennett, 365 U.S. 708 (1961); Griffin v. Illinois, 351 U.S. 12 (1956) and Johnson v. Avery, 393 U.S. 483 (1969).

No talismanic answer emerges from these cases as to how meaningful access to the Courts is to be assured. Indeed, the opinion of the Court in Bounds v. Smith encourages "local experimentation" and eschews adoption of any particular method of access as being per se mandated by the Constitution. Bounds v. Smith, 430 U.S. at 830-831. Even as this Court rejected a claim that apointment of counsel was constitutionally mandated for discretionary appeals, it reiterated that the touchstone of the constitutional requirement of access to the Courts was that it be

meaningful; i.e., that it provide a real way in which an inmate can present claims to the judicial system. Ross v. Moffitt, 417 U.S. 600 (1973). Moreover, there is a fundamental difference between a petition for discretionary review to an appellate court and an application for collateral relief. The former by the terms is confined to a record compiled ina trial court and hence susceptible to at least a preliminary screening by the judiciary, which inevitably appoints counsel if discretionary review is granted. An application for collateral relief may necessitate factual development outside of the record as the evidence in this case suggested. (Tr. at 33).

The concept of meaningful access emerges as a flexible doctrine whose application may impose different requirements in various contexts. A number of salient factors have to be considered in evaluating what constitutes meaningful access. Among these are the following:

a) the nature of the claim;

b) the complexity of the claim;

c) whether or not the claim includes allegations that necessitate the presentation of evidence outside of the record;

d) the legal abilities of the claimant; and

e) the resources available to the claimant.

Finally, the stage of the proceedings at which access is sought must be considered. Years ago, this Court ruled on equal protection grounds that indigent prisoners had to be provided counsel and transcripts to pursue appeals, if the same were available to non-indigent prisoners. The Court did not hesitate to recognize the appeal process as an integral component of the criminal justice system to which access was constitutionally required for all persons if provided to any persons.

In the last two decades, another component of the criminal justice system has achieved a similar footing. The

process of post-conviction review is now also an integral part of the criminal justice system. The American Bar Association has promulgated standards with regard to post-conviction relief, there is a uniform post-conviction relief statute and leading works on the practice of criminal law routinely include major sections on post-conviction relief. See, e.g., Criminal Defense Techniques, (Cipes. Ed.), Vol. 2, Morosco, State Post-Conviction Remedies.

The determination of what constitutes meaningful access must be considered in the context of the emergence of post-conviction relief as a component of the criminal justice system. The Georgia Habeas Corpus statute which tracks in essential aspects the language of many state post-conviction acts, provides a number of ways in which the Court may control the litigation. See G. Code Annotated, §50-127.

In this case, the ruling of the trial court was extremely limited. It only appointed counsel in the first instance to determine whether or not petitioner's claims were meritorious. Presumably, no one would deny the petitioner the right to proceed if the claims were meritorious nor presumably would there be much dispute over the claim that counsel would be of enormous assistance, both to the petitioner and the Court, in the conduct of an evidentiary hearing and the preparation of legal arguments. The Court Order further provided that if counsel found that the claim was meritorious, he would pursue it through the Georgia State Court system. That part of the Order would appear to be nothing more than a statement of the obligations imposed upon counsel, with or without a Court Order, pursuant to the canons of ethics. See also Anders v. California, 386 U.S. 738 (1967), rehearing denied (1967). The Court Order was issued after an evidentiary hearing which included testimony about the nature of the claims to be presented in the habeas corpus petition. The Court thus had a factual basis from which it could make the decision to appoint

counsel. Using the material before it, the trial court then exercised its discretion to appoint counsel in the limited manner set forth above. As the dissent to the Georgia Supreme Court decision said:

> However, none of our cases hold that a habeas corpus court lacks the authority to appoint counsel for an indigent habeas petitioner in the exercise of its discretion. This is what the trial court did here. The court appointed the PLCP to examine petitioner's case and to represent him on habeas if the PLCP determined that such a proceeding would be meritorious. That is not appointment of counsel as of right; it is an exercise of discretion. There being no showing of abuse of discretion, I would affirm the trial court.

Davis v. State, (Hill, J. dissenting at page 6 of slip opinion.)

After the evidentiary hearing, one observation that was apparent about petitioner's claim was that it necessitated the development of evidence outside of the record. (Tr. of hearing on Amended Complaint at 33). In the pre-trial context, the investigation of essential facts and the conduct of a sufficient pre-trial investigation has been recognized as essential to the provision of adequate assistance of counsel. Coleman v. Alabama, 399 U.S. 1, 9 (1970); Bresca v. New Jersey, 417 U.S. 921, 924, n. 3 (1974)(Marshall, J. dissenting, citing with approval American Bar Association Standards Relating to the Prosecution Function and the Defense Function (Approved Draft 1971).)

Adequate investigation is no less critical in the instant case. Yet, it belies reality to suggest that an indigent prisoner on death row can conduct such an investigation without the assistance of counsel.

It simply does not make any sense to hold that a court may exercise the plethora of powers given it by the habeas statute, including the holding of evidentiary hearings, but yet maintain counsel may not be appointed to assist in this process. Under the Georgia statute, post-conviction relief petitions may

include the taking of oral testimony, proof by depositions, or proof by the use of sworn depositions. This process of gathering and presenting evidence in those cases not susceptible to disposition from the face of the petition would inevitably be expedited, for all parties, by the presence of counsel.

Assuming arguendo that there is no constitutional requirement that a state provide convicted individuals with a means by which to collaterally attack convictions, once that right is created by statute, as Georgia has done, the procedural protections of the due process clause of the Fourteenth Amendment are implicated. Wolff v. McDonnell, 418 U.S. 539 (1974); Enomoto v. Wright, 434 U.S. 1052 (1978).

The precise contours of such procedural due process may vary and one of the foci of that variation may be the assistance that must be provided a person in the context of a hearing. While the automatic appointment of counsel has not been required, there has been recognition that such appointment may be desirable or even essential in some cases. Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973).

The authority of courts to appoint counsel in post-conviction proceedings has long been recognized. In Johnson v. Avery, 393 U.S. 483, 487-8 (1969), Justice Fortas observed:

> In most federal courts, it is the practice to appoint counsel in post-conviction proceedings only after a petition for post-conviction relief passes initial judicial evaluation and the court has determined that issues are presented calling for an evidentiary hearing. (Citations and footnote omitted.)
>
> It has not been held that there is any general obligation of the courts, state or federal, to appoint counsel for prisoners who indicate, without more, that they wish to seek post-conviction relief. See, e.g., Barker v. Ohio, 330 F.2d 594 (C.A. 6th Cir. 1964).

Indeed, the dissent in Johnson v. Avery focused not on the propriety of appointment of counsel for collateral attacks on convictions, but the viability of assuming that anyone not a

lawyer could provide any meaningful assistance to a prisoner preparing such a collateral attack, short of the most routine steps of preparing an initial petition. Johnson v. Avery, 393 U.S. 483, 498, (1968)(White, J. dissenting)

If access to the courts is to have any meaningful content, it must surely mean that a judge at the trial court level has the discretion to fashion a way in which to make available to an indigent defendant facing the death sentence, an opportunity to present his or her case to the Court. If the exhortation in Bounds v. Smith to avoid rigidity and promote flexibility may be construed to mean that in some circumstances in the context of the collateral attack on the criminal conviction, counsel need not be appointed; so, too, must it be construed to permit the appointment of counsel, particularly when there is a factual basis for justifying such action. In this case, a trial court determined that the appointment of counsel was necessary. In the absence of a basis for finding that conclusion clearly erroneous, failure to provide counsel constitutes the failure to provide access to the Courts and an unjustifiable depreviation of the petitioner's constitutional rights.

CONCLUSION

For these reasons, petitioner respectfully urges that this Court grant certiorari to determine whether the action of the Georgia Supreme Court reversing the decision of the Tattnall County Superior Court appointing counsel denied petitioner equal protection of the law and his constitutional right to meaningful access to the courts.

Dated: October 24, 1980

Respectfully submitted,

Robert B. Mann

Robert B. Mann
MANN & RONEY
344 Wickenden St.
Providence, R.I. 02903
Attorney for Petitioner

[1] Grateful acknowledgment to Merlyn O'Keefe, an attorney from the District of Columbia, for his work on behalf of petitioner Davis.

In the Supreme Court of Georgia

Decided: JUL 16 1980

36073. STATE, et al v. DAVIS
36074. DAVIS v. STATE, et al

459a.
351.

BOWLES, Justice.

Curfew Davis, hereinafter petitioner, is an inmate at the Georgia State Prison at Reidsville under death sentence for murder. He filed a complaint in Tattnall Superior Court seeking appointment of counsel to represent him in a habeas action and also seeking funds to hire investigators, pay expert witnesses, and pay litigation expenses. He originally named only the State of Georgia and Charles Balkcom, Warden, as defendants but later amended to include the Commissioners of both Troup[1/] and Tattnall Counties as defendants. It is petitioner's contention that either the State or one of its political subdivisions is required to furnish him counsel and other financial assistance so that he can have a "meaningful opportunity to present his claims in a state habeas corpus proceeding." He alleges that the Superior Court of Butts County has held that indigent death row inmates must be

1/ Davis was convicted and sentenced in Troup County.

provided with appointed counsel in state habeas proceedings and that equal protection requires that Tattnall County do the same. The trial court below dismissed all parties defendant from the case except the State of Georgia and Charles Balkcom, Warden. The court then appointed the Prisoner Legal Counseling Project, an organization funded by the State of Georgia, to examine petitioner's case and to represent him on habeas if it were determined that such a proceeding would be meritorious. In its order, the trial court recognized that this court has previously held that habeas corpus petitioners are not entitled to appointed counsel. It based its decision on an order entered in Butts County Superior Court requiring that counsel be appointed in death cases, finding that equal protection required the same treatment for inmates on death row in Tattnall County.

We reverse.

This court has repeatedly held that indigent habeas petitioners are not entitled to appointed counsel. Pulliam v. Balkcom, 245 Ga. 99(2) (____SE2d____) (1980); Harris v. Hopper, 243 Ga. 244(6) (253 SE2d 707) (1979); Spencer v. Hopper, 243 Ga. 532(2) (255 SE2d 1) (1979); McClure v. Hopper, 234 Ga. 45(6)

(214 SE2d 503) (1975). Public funds are already provided for appointed counsel to represent indigent defendants at their trials and on their appeals as of right. However, we know of no statute, case, or constitutional provision which would permit a trial judge to appoint counsel to a habeas petitioner, to be paid out of state or county funds.

Petitioner contends that he is entitled to meaningful access to the courts and that, in his case, to have meaningful access, he must have appointed counsel and funds. He relies primarily on the United States Supreme Court case of Bounds v. Smith, 430 U. S. 817 (97 S.Ct. 1491, 52 LEd2d 72) (1977).[2/] In Bounds, the Supreme Court held, "...the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." 430 U. S. at 828. The court did not hold that meaningful access required providing funds or appointing counsel to indigent habeas petitioners and we decline to extend the holding to so require.

2/ This court has already held that Bounds does not require the State to pay a petitioner's expenses in habeas corpus proceedings. See Harris v. Hopper, supra, at 245.

A compelling argument can be made that we simply hold that counsel may be appointed to indigent death row habeas petitioners just because of the irrevocability of death. But if meaningful access to the courts means appointed counsel, are not all indigent habeas petitioners entitled to meaningful access to the courts and therefore appointed counsel? Would not equal protection require that all indigents receive appointed counsel? And when should such counsel be appointed? Taken to its logical extreme, petitioner's argument would require that counsel be assigned as soon as each inmate gets to his or her cell. Only then could we be sure that those indigents without enough intelligence to ask for an attorney were getting "meaningful access to the courts," as claimed by petitioner.

Even assuming we might hold that indigent death row habeas petitioners were entitled to appointed counsel, petitioner's argument goes further to require us to also provide funds for investigation, etc. The argument is that without funds to investigate and obtain facts to prove his case, petitioner is denied "meaningful access to the courts," as surely as if he never had an attorney. Though "...the cost of protecting a constitutional

right cannot justify its total denial," "[t]his is not to say that economic factors may not be considered, for example, in choosing the methods used to provide meaningful access." Bounds, supra, at 825. Testimony in this case shows that the Prisoner Legal Counseling Project already visits each prison every month to interview prisoners, give legal advice, and initiate court action in meritorious cases. It is neither necessary or desirable to appoint the Project to any given case and by appointing it to all death cases, for example, it may become hampered in dealing with meritorious cases of other kinds.

Because we today reaffirm our previous holdings that indigent habeas petitioners are not entitled to appointed counsel, petitioner's appeal from the dismissal of defendant county commissioners is moot.

Judgment in case number 36073 reversed. All the Justices concur, except Hall, J. who dissents.

Appeal in case number 36074 dismissed. All the Justices concur.

36073. STATE et al. v. DAVIS. (610)

36074. DAVIS v. STATE et al. (611)

HILL, Justice, dissenting.

I would affirm the order of the trial court. It is true that indigent habeas corpus petitioners are not entitled to appointed counsel as a matter of right. Pulliam v. Balkcom, supra, 245 Ga. at 100; Spencer v. Hopper, supra, 243 Ga. at 537; McClure v. Hopper, supra, 234 Ga. at 50.

However, none of our cases hold that a habeas corpus court lacks the authority to appoint counsel for an indigent habeas petitioner in the exercise of its discretion. That is what the trial court did here. The court appointed the PLCP to examine petitioner's case and to represent him on habeas if the PLCP determined that such a proceeding would be meritorious. That is not appointment of counsel as of right; it is an exercise of discretion. There being no showing of abuse of discretion, I would affirm the trial court.

SUPREME COURT OF GEORGIA

ATLANTA, July 30, 1980

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Curfew Davis v. State of Georgia et al.

Upon consideration of the Motion for Rehearing filed in this case, it is ordered that it be hereby denied. All the Justices concur, except Hill, J., dissents.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Hazel E. Hafford, Deputy Clerk.